



May 17, 2007

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 02-55

Dear Ms. Dortch:

This letter and the accompanying *Rebanding Realities Nearly Three Years On: An RCC Consultants, Inc., Discussion Paper* are being filed electronically for inclusion in the public record of the above-entitled proceeding.

Very truly yours,

A handwritten signature in blue ink that reads 'Carl Robert Aron' followed by a stylized flourish.

Carl Robert Aron
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*Rebanding Realities Nearly Three Years On: An RCC
Consultants, Inc., Discussion Paper*

**The 800 MHz Rebanding: Good Intentions, Structural Flaws, and Implementation
Failures**

- *Should the Problems with the 800 MHz Rebanding Have Been Foreseen?*
 - *Could the Problems Experienced Have Been Avoided?*
- *Where Does Responsibility Lie for the Failure to Avoid those Problems?*
- *Are Effective Remedial Actions Available to Save the 800 MHz Rebanding?*

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Executive Summary

Almost three years have passed since the Federal Communications Commission (the “FCC”) issued its report and order with respect to the reconfiguration of the 800 MHz band.

Where is the 800 MHz Rebanding now that almost three years have passed?

In certain material respects, the 800 MHz Rebanding is failing – failing to meet the expectations of 800 MHz licensees in relation to a cost-free, trouble-free transition to comparable facilities and failing to meet the schedule provided therefor.

Why is the 800 MHz Rebanding failing in those respects?

While responsibility for the failures of the 800 MHz Rebanding has been declared by the numerous commentators thereon to be the responsibility of various participants therein, including, but not limited to the FCC, the 800 MHz Transition Administrator (the “Transition Administrator”), Sprint Nextel Corporation (“Nextel”), the 800 MHz licensees, and consultants to those licensees, the principal cause for the failure of the 800 MHz Rebanding lies in certain fundamental structural flaws in the design thereof, and a material contributing cause of that failure lies in the Transition Administrator’s not acknowledging and compensating for those flaws.

What are the flaws in the 800 MHz Rebanding?

The fundamental flaw is the failure to realize and address the conflict between the FCC’s mandate for a cost-free, trouble-free transition to comparable facilities and the determination of Nextel not to exceed its minimum funding obligations established by the FCC, the reliance upon a free market bargaining process to determine the issue of funding or reimbursing 800 MHz licensees in relation to their reconfiguration costs, and the failure to recognize and address the great advantages of Nextel over 800 MHz licensees in the bargaining process.

How have those flaws impacted the 800 MHz Rebanding?

Those flaws have expressed themselves in the compromise of the principles established by the FCC for the purpose of improving public safety communications in the 800 MHz band – compromise of the mandate for a cost-free trouble-free transition to comparable facilities and compromise of the planning necessary for a safe and effective reconfiguration of 800 MHz licensees and, in particular, public safety licensees.

Why hasn’t the Transition Administrator compensated for those flaws?

The Transition Administrator has construed its mission narrowly and in procedural terms and has been unwilling to seek to level the bargaining power of Nextel and the 800 MHz

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licensees and has, in fact, by its policies and practices materially increased the advantages of Nextel in the bargaining process. In addition, the Transition Administrator seems never to have adopted the FCC's purpose to improve public safety communications in the 800 MHz band as a part of the mission of the Transition Administrator.

What will be the consequences if those flaws in the 800 MHz Rebanding are left in place and not remedied?

Proper and adequate planning and implementation funding has not been and will not be made available or not timely so. Licensees have been and will be forced to compromise their requirements for a safe and effective reconfiguration process. Inadequately planned implementation of reconfiguration could result in the unavailability, diminished capacity, or degraded functionality of an 800 MHz public safety radio system at a time that system is called upon to support first responder and other critical parties in an emergency. The emergency response may be made ineffective or less effective by reason of the problems with the radio system. Lives, including those of first responders, and property could be placed at risk.

Is anyone trying to remedy those flaws and the maladministration by the Transition Administrator?

While concern among 800 MHz licensees and their representative organizations generally in relation to the 800 MHz Rebanding is widespread, there has been no serious effort to examine the reasons for failure, and most recent discussion has focused upon the consequences of failure to Nextel and to the schedule for the 800 MHz Rebanding. Unfortunately, much of the recent discussion may be or has been driven by agendas designed to defend or undermine the position of Nextel. In certain respects, those discussions have been quite superficial, and do not reflect a clear willingness to engage the fundamental problems directly and with candor.

Who and what must change for the 800 MHz Rebanding to be placed upon a course toward success?

In the view of RCC Consultants, Inc. ("RCC"), it is with respect to the Transition Administrator that fundamental changes need to be made for the 800 MHz Rebanding to be set right. The structural flaws inherent therein are the unintended consequences of the implementation of the best of intentions on the part of the FCC. The Transition Administrator could have recognized and compensated for those flaws, but did not do so.

Of course, Nextel too must change, but there are certain indications that a new and more sensible and practical approach to the 800 MHz Rebanding may possibly be taking hold within Nextel. RCC is aware of a settlement in principle recently reached between a state and Nextel which would not have been achieved but for a new and creative approach adopted by the concerned senior Nextel personnel.

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While RCC has, of course, battled with Nextel in numerous mediations on behalf of RCC's public safety clients and participated in numerous settlements as well, and, while RCC has differed frequently and directly with Nextel upon issues of fact and principle, RCC always understood that Nextel was working in its own interest within a system and structure that were, from the standpoint of 800 MHz public safety licensees, regrettably flawed. The hard line acknowledged by Nextel to have been taken on the reimbursement of planning and reconfiguration costs was, in the view of RCC, both wrong in principle and shortsighted from the standpoint of Nextel. There is some reason to hope that Nextel's outlook in this respect is changing.

In the view of RCC, the FCC needs to recognize that, without candid consideration of the issues causing the failure of the 800 MHz Rebanding and the root causes thereof, no serious discussion of remediation of the failures of the 800 MHz Rebanding is possible. There can be no doubt that the FCC sought to do the right thing in relation to the 800 MHz Rebanding and provided an overarching mechanism which, although flawed, could, by proper and skillful management on the part of the Transition Administrator, have avoided all or substantially all of the problems that have emerged. The FCC and the 800 MHz public safety licensees, and, perhaps, in retrospect, even Nextel, have very substantial reasons to be disappointed in the performance of the Transition Administrator, which, through December 31, 2007, had earned fees and incurred expenses of almost \$65 million.

The conclusion of RCC is that, for the 800 MHz Rebanding to be successfully completed, the most serious changes required are those required by or to the Transition Administrator. This conclusion derives from an analysis of the critical issues and the underlying causes thereof and the development, based upon that analysis, of measures designed to provide effective remediation. That analysis and that development are described in this *Rebanding Realities Nearly Three Years On: An RCC Consultants, Inc., Discussion Paper* (this "Discussion Paper").

RCC suffers from no illusion that all stakeholders in the 800 MHz Rebanding will embrace this Discussion Paper with enthusiasm and without reservations. Nevertheless, RCC hopes that all such stakeholders will find this Discussion Paper to be a useful and serious contribution to the sorely-required, direct, and candid analysis of the critical issues affecting the 800 MHz Rebanding and the underlying causes thereof and to equally required development of effective remediation measures.

Bottom line, what does RCC recommend?

RCC recommends leaving the Transition Administrator in place and subjecting the Transition Administrator to the control of a full-time chief executive officer with strong public safety credentials who would be able to retain such support as may be required and who would report to a committee whose members would be broadly representative of the public safety community. Both the chief executive officer and the committee would be subject to active FCC-oversight and would have as their sole responsibility directing the

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staff of the Transition Administrator such as to rededicate its efforts to the purposes of the FCC in ordering the 800 MHz Rebanding and to the realization of the principles of the FCC's mandate for a cost-free, trouble-free transition to comparable facilities for 800 MHz public safety licensees.

RCC specifically recommends that the chief executive officer be a person seconded by the FCC or drawn from the ranks of those closely associated with the interest of public safety communications and that the proposed committee be composed of representatives of the principal organizations serving the interests of the public safety community and be constituted as an official FCC-sanctioned "Rebanding Leadership Committee" to ensure that the work of the Transition Administrator well serves the purposes, principles, and mandate of the FCC in relation to the 800 MHz Rebanding and no other purpose.

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Discussion Paper

I. Introduction

The FCC clearly acted with the best of intentions when, almost three years ago, it launched its ambitious program for the restructuring of the 800 MHz band with a view to improving public safety communications therein. Those intentions have not produced the results expected by of the stakeholders in that process and, in particular, 800 MHz public safety licensees. That disappointment in expectations has led to substantial frustration, doubts, and concern on the part of those licensees and others, and increasing delays in the implementation of the reconfiguration process are directly related to those disappointed expectations.

Often, public expression of that frustration has expressed itself in terms related to matters of scheduling – delays in various aspects of the process and concern that the FCC's overall timetable cannot, as a practical matter, be met. While scheduling considerations are clearly important, the focus on scheduling may serve to mask deeper and more serious problems affecting the 800 MHz Rebanding and to defer serious consideration of those problems, the nature and sources thereof, and effective means for their remediation.

Recognition of problems in the 800 MHz Rebanding uncoupled from analysis of the obvious problems is a formula for abdication and resignation and not a well-planned path to amelioration or elimination of the critical issues that place the success of the 800 MHz Rebanding in jeopardy.

It is the gravamen of this Discussion Paper that:

- **The implementation of the best of intentions of the FCC has produced some substantive results which the FCC cannot have wished for;**
- **Those undesired results include the actual or potential compromise of the planning for reconfiguration and of physical reconfiguration processes that could place 800 MHz public safety communications systems at risk of disruption, a result that can hardly have been intended by the FCC in any proceeding and certainly not in a proceeding with the primary purpose of improving public safety communications;**
- **Those undesired results also include the imposition of costs upon 800 MHz licensees, which imposition is inconsistent with the FCC's representations that all costs properly incurred in connection with the 800 MHz Rebanding would be borne by Nextel;**

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- **The primary or first cause of those undesired results is to be found in certain structural flaws inherent in the process established by the FCC for the 800 MHz Rebanding;**
- **The implementation of the 800 MHz Rebanding by the Transition Administrator could have, but has not mitigated and has, rather, exacerbated those structural flaws;**
- **The structural flaws and the defects in implementation of the 800 MHz Rebanding by the Transition Administrator must be remedied directly;**
- **The remediation of those flaws and defects cannot proceed without a penetrating understanding of the nature and sources thereof; and**
- **Those flaws and defects are not, even with time, self-healing, and, therefore, merely extending the FCC's schedule for the 800 MHz Rebanding, which is in any event almost certainly necessary, is not an effective remediation method.**

II. An Overview of the State of the 800 MHz Rebanding

Candor in discussions of the state of the 800 MHz Rebanding is not universal. The Transition Administrator appears certainly to prefer avoiding public consideration of the true state, direction, and unintended consequences of the 800 MHz Rebanding and its own contributions thereto. Neither silence nor lack of candor seems likely to serve any purpose of affected 800 MHz licensees. Any disappointment of the FCC in relation to the 800 MHz Rebanding has not been publicly aired, and the FCC has offered the public no indication of its view of the performance of the Transition Administrator or the contribution of Nextel or other participants to the problems that have arisen in relation to the 800 MHz Rebanding.

It has long been recognized by Alcoholics Anonymous and others that one cannot solve a problem that one does not admit one has, and that observation is not limited to substance abuse. For any serious progress to be made in relation to the 800 MHz Rebanding, concerned participants, starting with the FCC and the Transition Administrator, have to stand up before other sufferers in the reconfiguration process and admit they have a problem.

The fact is that, in certain very material respects, the 800 MHz Rebanding is failing:

- *The Transition Administrator may be viewed as not providing an even-handed administration of the 800 MHz Rebanding, but, rather, as favoring and even deferring to Nextel;*

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- *Planning funding is not being timely and adequately made available with adverse or possibly adverse consequences to the ability of 800 MHz licensees to plan properly for a safe and effective rebanding;*
- *Nextel has to date made an admittedly strenuous effort to resist the underwriting of planning and reconfiguration costs;*
- *The process of bargaining for planning funding and funding for physical reconfiguration causes the compromise of the principles established by the FCC for the 800 MHz Rebanding and is skewed in favor of Nextel;*
- *Only a very modest portion of the money committed by Nextel to the 800 MHz rebanding has found its way to 800 MHz licensees with the vast bulk thereof being spent by Nextel for its own reconfiguration efforts (for which Nextel claims credit against its minimum funding obligations) or allocated to the Transition Administrator for its own quite ample fees and expenses;*
- *In a material number of instances the money spent fighting over the costs of planning is large in relation to the actual planning costs and often larger than the amount of disputed items of planning cost;*
- *No provision has been made for funding of the actions necessary to apply, negotiate, and fight in mediation for planning funding;*
- *Nextel has sought to intrude itself into the development of rebanding plans for 800 MHz public safety licensees without Nextel's having either true public safety experience or responsibility with adverse or potentially adverse consequences to the public safety during system reconfiguration;*
- *The Transition Administrator has spent a great deal of time and money proliferating policies, publications, and forms of, in many instances, little, no, or negative value and has not made the improvement of public safety communications its focus despite that purpose's being the primary purpose in relation to the 800 MHz Rebanding; and*
- *The Transition Administrator has expended a great effort on public relations and magnifying its purported contribution to the 800 MHz Rebanding, but has expended little effort on providing leadership, effectively addressing difficult problems, or making any serious technical contribution to the array of serious issues attending the reconfiguration process.*

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This evidence of failure is important to consider, but the causes of failure must be sought in a basic examination of the 800 MHz Rebanding and the sources of its troubles if the objective of analysis is the development of an understanding upon which effective remedial action can be based.

Those sources of failure are, in the view of RCC, to be found in:

- *The manner in which the FCC structured the 800 MHz Rebanding and the flaws in that structure which have become apparent, are becoming more apparent, and will, with time and without remediation, become increasingly apparent;*
- *The manner in which the authority of the FCC in relation to the 800 MHz Rebanding was delegated and the defects in that delegation which have, with time, evidenced themselves;*
- *The manner of the exercise by the Transition Administrator of the powers delegated to it by the FCC in connection with the 800 MHz Rebanding; and*
- *The manner of the exercise by 800 MHz licensees of their responsibilities in connection with the 800 MHz Rebanding.*

This paper is intended to stimulate discussion of:

- The failures affecting the 800 MHz Rebanding, including the ultimate sources thereof,
- The possible remediation methods which could overcome or compensate for such failures, and
- All of the other issues and questions implicit and explicit in the title of this paper.

This paper will serve its purpose if and only if such discussion ensues and action is taken in consequence thereof.

Serious questions and issues respecting the 800 MHz Rebanding and the role of the Transition Administrator and Nextel therein were raised by RCC with the FCC in RCC's 'Pandora Filing' of December 2005.

The Pandora Filing generated much discussion, but there was no public action by the FCC and no response by the Transition Administrator. A recent addition to the discussion initiated by the Pandora Filing was made in the April 19, 2007, letter of AT&T Inc. to the FCC in WT Docket No. 02-55. That letter made a number of important points and, in certain respects, updated the Pandora Filing which had anticipated those points, but made no contribution to understanding the deep causes of the troubles

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affecting the 800 MHz Rebanding and seemed, in certain respects, to be directed more at making life increasingly difficult for Nextel rather than at curing the woes experienced by 800 MHz public safety licensees in relation to the 800 MHz Rebanding.

A quite remarkable contribution to this discussion was made in the letter of counsel to Nextel filed with the Commission on April 20, 2007, together with “Sprint Nextel’s Proposal to Streamline 800 MHz Band Reconfiguration” (the “Nextel Proposal”).

The Nextel Proposal offers, in substance, the following explanation for the difficulties experienced by licensees in negotiating planning funding agreements (“PFAs”) and frequency reconfiguration agreements (“FRAs”) with Sprint Nextel: For the 21 months of the negotiation process, Nextel felt compelled by its interpretation of the applicable law to resist all claims by licensees for planning or reconfiguration costs that were not clearly shown to be the “absolute lowest cost.” RCC makes no comment here upon the Nextel Proposal, except to note that that proposal does not seek to identify and address the root causes of the troubles affecting the 800 MHz Rebanding, but, rather, seeks amelioration through schedule-related changes and the modification of the standard applicable to assessing the propriety of planning and reconfiguration costs.

The letter filed with the Commission on May 9, 2007, by six national public safety organizations (the Association of Public-Safety Communications Officials, the International Association of Chiefs of Police, the International Association of Fire Chiefs, the Major Cities Chiefs Association, the Major Counties Sheriffs Association, and the National Sheriffs Association) in response to the Nextel Proposal makes a first step in trying to identify a “root cause” of many of the disputes between 800 MHz public safety licensees and Nextel (the “May 9 Letter”). The May 9 Letter also usefully encourages the FCC to address that root cause and is, therefore, entirely consistent with the effort made in this Discussion Paper to explore the deepest sources of the problems affecting the 800 MHz Rebanding and to offer realistically available remedies based upon that exploration for those problems.

III. The History of the 800 MHz Rebanding as a Cautionary Tale for Those Who Embrace Public/Private Partnerships with Uncritical Enthusiasm

RCC cannot, in connection with the preparation of this Discussion Paper, be unmindful of the pendency of various dockets before the FCC bearing upon the 700 MHz band and, in particular, the possibility of the utilization of a public/private partnership as a means for the development of a national interoperable broadband public safety network.

The enthusiasm for that approach on the part of certain participants in those proceedings seems naively uncritical when considered in relation to the troubles experienced in relation to the 800 MHz Rebanding, which is, RCC believes, in substance, the largest public/private partnership undertaken to date in the United States to improve public safety communications.

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To the extent that the 800 MHz Rebanding has revealed the tensions and problems inherent in public/private partnerships involving public safety communications, the proceedings respecting a possible public/private partnership as a means for the development of a national interoperable broadband public safety network should proceed very cautiously, draw lessons from the failure of the 800 MHz Rebanding, and seek to avoid structural flaws that could imperil the project.

RCC has made a substantial submission in the 700 MHz proceedings and is considering a further submission in response to a presently pending notice of proposed rulemaking.

IV. The FCC's Expression of Good Intentions

The good intentions of the FCC in relation to the 800 MHz Rebanding are clear and undeniable. By a combination of:

- restructuring the 800 MHz band,
- inducing Nextel to return a substantial portion of its authorizations in that band and to fund the reconfiguration process, and
- promulgating new rules respecting interference in the 800 MHz band,

the FCC showed a truly admirable willingness to take on a major program which, if successful, would both reduce a serious interference problem and make additional spectrum available on a preferential basis to public safety licensees.

V. The Legal Expression of the FCC's Good Intentions

In order to carry out its good intentions in relation to improving public safety communications in the 800 MHz band, the FCC set forth certain very sensible rules to govern the process and achieve the intended outcome.

The basic rules established by the FCC were:

- *Licensees were to be protected from more than minimal disruption of operations during and after the reconfiguration;*
- *Licensees were to be assured of maintaining facilities after reconfiguration in all material respects at least comparable to those in operation before the commencement of reconfiguration;*
- *Licensees were to recover or have access to funding for all costs reasonably incurred in connection with the reconfiguration process; and*

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- *Nextel was to fund all reconfiguration costs without any limitation upon its liability in this respect.*

The principles set forth in those rules are unexceptionable. All of the problems in relation to those rules relate to their interpretation and implementation in practice. That interpretation and implementation process was left by the FCC in largest measure to a bargaining process. Outcome determination by bargaining reflects the strengths and weaknesses of the parties to the bargaining and as much or more than the applicable principles. It is in the painful interaction between bargaining and principle that much of the problem with the 800 MHz Rebanding has its genesis.

The facts that:

- *those principles have not always been fully reflected in deals made as a result of the bargaining process, and*
- *where the bargaining process did not enable those principles to be fully reflected in a deal between a licensee and Nextel, deals were not in all cases made,*

are indicative of a deep structural problem which is at the heart of the causes of the disappointment of the expectations of 800 MHz public safety licensees and the substantive problems which plague the 800 MHz Rebanding.

This observation that principles and bargaining do not play well together is developed in detail in this paper.

VI. The Reasonable Expectations Engendered by the FCC's Well-intended Rules and the Consequent Disappointment

The above-noted rules of the FCC, as read by 800 MHz licensees, created apparently reasonable expectations for trouble-free and cost-free reconfigurations of their affected 800 MHz radio systems and their maintenance of comparable facilities.

Those apparently reasonable expectations have in many instances led to serious disappointment because, in brief summary:

- *The availability of planning funding after application therefor has not been prompt or adequate;*
- *The process of applying for planning funding has not itself been funded at all;*
- *The availability of planning funding even after approval thereof by Nextel has not been prompt;*

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- *Nextel has to date admittedly resisted very strenuously the cost claims of 800 MHz public safety licensees in relation to planning and reconfiguration;*
- *The purpose of improving public safety communications in the 800 MHz band has been a largely inoperative consideration in administration of the 800 MHz Rebanding by the Transition Administrator; and*
- *Misallocation of resources has characterized a generally inept administration of the 800 MHz Rebanding by the Transition Administrator, which has failed to provide leadership and focus on critical issues with experience and insight.*

The unavailability of prompt and adequate planning funding and the lack of any provision for funding the process, often lengthy, contentious, and expensive, of securing planning funding have:

- undermined the expectation of a cost-free rebanding as 800 MHz licensees have had to expend their own funds or rely upon the credit of others to provide resources to fight battles with Nextel over planning funding; and
- undermined the expectation of a trouble-free rebanding by putting in doubt whether required planning would in fact be adequately financed by Nextel.

Nextel's strenuous resistance to the recovery of planning and implementation costs has had similar effects upon expectations of 800 MHz licensees for a cost-free and trouble-free rebanding.

The relegation by the Transition Administrator of the FCC's primary purpose of improving public safety communications in the 800 MHz band to a tertiary or quaternary goal, if even that, has undermined expectations of 800 MHz licensees which cannot recognize the good intentions of the FCC in the, at best, maladroit administration by the Transition Administrator, in which:

- **scheduling and cost minimization have been elevated to a level of priority that should have been reserved to improving public safety communications in the 800 MHz band; and**
- **the avoidance of more than minimal disruption and the maintenance of comparable facilities have been improperly subordinated to such scheduling and cost minimization.**

This discussion Paper seeks to identify the ultimate sources of those reasons for the disappointed expectations of 800 MHz public safety licenses.

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VII. Structural Flaws and Implementation Failures: In General

The disappointed expectations of 800 MHz public safety licensees in relation to the 800 MHz Rebanding are the results, but not the causes, of the troubles affecting that process.

Those causes, as RCC has herein noted, have their genesis in the combination of:

- *Structural flaws in the design of the 800 MHz Rebanding;*
- *Flaws in the delegation of authority; and*
- *Implementation failures which magnified rather than minimized the structural flaws.*

The FCC undertook a truly gigantic project when it sought to marry the technical or physical dimension of restructuring the 800 MHz band (the “Physical Rebanding Process”) to the separate, but very much related, problem of sorting out financial responsibility in relation thereto through negotiations and, in failure thereof, mediation, and thereafter administrative and judicial reconsideration and review (the “Legal Rebanding Proceeding”).

Implicit in that marriage of the Physical Rebanding Process and the Legal Rebanding Proceeding were a number of structural flaws, including technical problems and process conflicts. That marriage could survive and prosper if and only if the administration of the 800 MHz Rebanding had been carried out with an acute awareness of and considerable sensitivity to those structural flaws.

Such administration was not provided, and, instead, as discussed below, an administration was provided which not only exacerbated those structural flaws, but also both

- *added deadweight to the process which slowed progress through cumbersome review requirements of great expense and doubtful value; and*
- *short-weighted the process by providing no effective leadership and inadequate technical expertise and capacity.*

If the structural flaws of the 800 MHz Rebanding could have been and were in fact compensated for by an insightful administration providing effective leadership, then the disappointment in expectations would not have arisen or would have been substantially diminished. In the view of RCC, the structural flaws could, in fact, have been compensated for, but were not. The Transition Administrator had the last clear chance to

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steer the proceeding away from the threatening rocks and shoals, but, instead of so doing, increased the speed with which the proceeding went aground.

VIII. Structural Flaws in the Design of the 800 MHz Rebanding

The declared purpose of the FCC in ordering the 800 MHz Rebanding was to improve public safety communications.

The FCC clearly recognized the complexities and risks inherent in the reconfiguration of the 800 MHz band and sought to avoid harm to 800 MHz licensees by mandating a disruption-free, cost-free transition to comparable facilities for 800 MHz licensees.

The realization of that mandate has proven more difficult to accomplish, more contentious, and far less smooth than the FCC likely hoped or expected. The failure of the realization of that mandate has its roots in certain structural flaws designed into the 800 MHz Rebanding.

Those flaws consist in:

- *the heavy reliance placed by the FCC upon Nextel and the Transition Administrator for carrying out the mandate of the FCC;*
- *the failure on the part of the FCC to recognize that the interests of Nextel were in conflict with the FCC's mandate and to create a counterbalance in relation thereto;*
- *the failure on the part of the FCC effectively to institutionalize its declared purpose and its mandate in the authority granted to the Transition Administrator;*
- *the failure of the FCC to assure that the Transition Administrator had sufficient technical expertise to avoid dependence upon Nextel in technical and logistical matters;*
- *the failure of the FCC to assure that the Transition Administrator would be credible by reason of its own earned reputation and its independence from Nextel; and*
- *the failure of the FCC to recognize the weakness of the bargaining/financial position of many licensees relative to Nextel and in the absence of support from the Transition Administrator for which no provision was made by the FCC.*

To achieve its mandated disruption-free, cost-free transition to comparable facilities for 800 MHz licensees, the FCC placed very heavy reliance upon Nextel and the Transition

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Administrator in carrying out the mandate of the FCC. The nature and extent of that reliance is at the heart of the structural flaws in the 800 MHz Rebanding.

First, in the case of Nextel, that reliance was misplaced and appears to have been based upon a failure on the part of the FCC to recognize that the interests of Nextel were naturally and necessarily (despite disclaimers) in conflict with the FCC's mandate.

The FCC mandated a disruption-free, cost-free transition to comparable facilities for 800 MHz licensees and specifically denied Nextel any cap or limitation on its maximum financial responsibility in relation to the 800 MHz Rebanding. While the FCC did require a minimum commitment by Nextel, no maximum commitment protected Nextel. The possibility, indeed the certainty, that Nextel would seek to utilize all possible means not to exceed its minimum commitment was not effectively addressed by the FCC. The FCC did not create an effective counterbalance for Nextel's conflict with the mandate for a disruption-free, cost-free transition to comparable facilities for 800 MHz licensees if that mandate were to require financing by Nextel greater than its minimum required commitment.

Second, in the case of the Transition Administrator, the FCC may have envisioned the Transition Administrator's providing that required counterbalance to Nextel, but, if that was the FCC's thinking, it may have failed to express that purpose effectively for the understanding of the Transition Administrator or the Transition Administrator may have ignored or failed to give full effect to the clearly declared purpose of the FCC in ordering the 800 MHz Rebanding and delegating to the Transition Administrator the authority to accomplish that purpose.

The authority granted to the Transition Administrator by the FCC apparently was not communicated with sufficient clarity to impress upon the Transition Administrator that improving public safety communications in the 800 MHz band was to be, as it was for the FCC itself, the highest priority of the Transition Administrator. However, to be fair to the FCC, that point should have been rather obvious, but was apparently not so obvious, to the Transition Administrator.

The authority granted to the Transition Administrator was exercised to provide supervision without purpose and management without high priority policy goals except adherence to schedule and elevation of certain secondary or tertiary considerations (*e.g.*, the transfer of any unspent portion of the minimum financial commitment of Nextel to the federal government) to high priorities, where the effect of such elevation was to undermine the importance of the unlimited liability of Nextel to fund the 800 MHz Rebanding.

The FCC chose to reserve itself only a modest role in the appointment of the Transition Administrator and left the initial designation of the Transition Administrator to a committee of stakeholders, including Nextel, subject only to the FCC's approval. The FCC offered little by way of substantive criteria for the choice of the Transition

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Administrator and, in particular, did not require that candidates demonstrate sufficient technical expertise to avoid possible dependence upon Nextel in technical matters and did not establish a rule or rules to preclude the choice of any party as Transition Administrator that lacked critical credibility and independence from Nextel.

Third, in the case of the 800 MHz licensees, the FCC did not recognize the weak bargaining position of many of them. That weak bargaining position derived from financial constraints, budget-timing issues, and institutional disinclination to resist unreasonable positions of Nextel even if in conflict with the mandate of the FCC in relation to the 800 MHz Rebanding. Also contributing to that weak bargaining position was the fact that internal counsel were not familiar with the relevant rules and regulations and did not have and could not gain the facility therewith developed by and available to Nextel as a result of its exposure to every transaction arising from the 800 MHz Rebanding.

These sources of inequality in bargaining power placed the realization of the FCC's mandate at risk in the absence of instructions of the FCC to the Transition Administrator including taking such measures as were necessary and proper to redress that inequality, and no such instructions were given by the FCC to the Transition Administrator.

800 MHz licensees did not anticipate and were not prepared for the high level of resistance to funding displayed by Nextel or the need to have substantial engineering and legal resources available to overcome that resistance. 800 MHz licensees may have anticipated more assistance from the Transition Administrator in relation to the development of a process which would assure those licensees of receiving the benefits of the FCC's mandate for a cost-free, trouble-free transition to comparable facilities, but those licensees certainly did not anticipate the Transition Administrator's frustration of the achievement of that mandate or its favoring Nextel in policy development.

The 800 MHz licensees' being unprepared for a high level of resistance to funding on the part of Nextel is a reflection of a certain degree of commercial naïveté on the part of some licensees, which do not function in Nextel's world. Nextel's resistance to funding was entirely predictable and actually predicted in early papers and presentations by RCC, which received as an initial response a mixture of curiosity and at least partial disbelief. Nextel's vigorous protection of its own interests was and remains entirely understandable, and Nextel's taking advantage of the broad scope for such protection and the lack of any constraints thereon provided by the Transition Administrator is also entirely understandable. Nextel has sought to play the 800 MHz Rebanding as the contest that it was structured to be and has done so with skill and energy and has often pressed wherever possible to the outer limits of the rules of the game.

While the tactics of Nextel can be analyzed and their effects on the 800 MHz Rebanding considered and while those tactics often seemed to reflect an indifference to a need for rational argument by Nextel and a rational response by Nextel to the positions and legitimate concerns of 800 MHz public safety licensees, it is not clear that those tactics

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can be criticized upon strict legal grounds because it is not apparent that Nextel has violated the rules of the contest established by the FCC and, especially, as those rules have been implemented (or effectively diluted) by the Transition Administrator. Nevertheless, the practices of Nextel in negotiations and mediations have often, although not always, appeared to include asking questions, receiving full and complete answers from 800 MHz public safety licensees, and disregarding the answers or asking the same questions again and again as if, contrary to fact, responsive information had not been provided. Such practices appear to have been tolerated by some mediators who have been reluctant to address issues of good faith or at least to do so by application of a standard that is capable of being violated, but those practices hardly made a positive contribution to the process.

The 800 MHz licensees' disappointed expectations in relation to the Transition Administrator stand on entirely different grounds. The Transition Administrator does not have the "playing by the rules" defense that is available to Nextel. The Transition Administrator was itself a rule maker, and it is in relation to its performance of that task that its contribution to the 800 MHz Rebanding must be considered. In many respects, as hereinafter detailed, the Transition Administrator failed.

Those failures of the Transition Administrator include:

- **Not assuring the realization of the FCC's mandate for a cost-free, trouble-free transition to comparable facilities;**
- **Not providing required leadership;**
- **Adopting a free market bargaining perspective that ignored the disparity in bargaining power between Nextel and 800 MHz licensees;**
- **Tilting the 'free' market bargaining process further in favor of Nextel;**
- **Not focusing on the central purpose of the FCC in relation to the 800 MHz Rebanding; and**
- **Spending substantial time and resources on matters of no consequence or no benefit to the 800 MHz Rebanding.**

The contributions of Nextel and the Transition Administrator are considered in the two sections that follow, but those contributions are accorded disparate treatment given the differences between their respective responsibilities.

IX. The Foreseeable Nature of the Structural Design Flaws and the Need for Compensation therefor: The Problem of Cost-bearing by Nextel

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The conflict between the FCC's mandate for a disruption-free, cost-free transition to comparable facilities for 800 MHz licensees and Nextel's interest in minimizing its financial obligations in relation to the 800 MHz Rebanding was plainly foreseeable and may have been foreseen by the FCC. In any case, that conflict was not avoidable in the absence of either:

- unrealistic expectations of saintly self-sacrifice on the part of Nextel or
- the establishment of a process for the determination of the obligations of Nextel not based upon bargaining between Nextel and 800 MHz licensees, Nextel's consent to which can only be assumed upon the basis of unrealistic optimism.

That realistically unavoidable conflict was not effectively addressed by the FCC, but was, rather, permitted to work itself out in the Legal Rebanding Proceeding in a manner that clearly undermined the mandate of the FCC. The consequences of the exercise of self-interest by Nextel and the nature of the relationship between bargaining and principles would necessarily, in the absence of a counterbalance provided in the administration of the 800 MHz Rebanding by the Transition Administrator, lead to the compromise of the purpose and mandate of the FCC.

The Transition Administrator apparently never saw the need for providing such a counterbalance and viewed its responsibility as exercising an "independent and neutral role in the reconfiguration process." The Transition Administrator saw itself "as a neutral party between license holders and Sprint Nextel – and is solely responsible to the FCC." Leaving aside for now the asserted independence and neutrality of the Transition Administrator, as to both of which there is serious question in fact and/or appearance, the fact is that the Transition Administrator certainly did not intervene in the Legal Rebanding Proceeding on the side of 800 MHz licensees.

The Transition Administrator clearly intended to leave 800 MHz licensees to the tender mercy of Nextel as is clear from the following passage in the Transition Administrator's Reconfiguration Handbook (June 30, 2006): "...the TA cannot negotiate with Sprint Nextel on behalf of a reconfiguring licensee or serve as your agent, attorney, or in any other representative capacity. ... The TA strongly encourages direct negotiations between the parties as the fastest and most effective and efficient method of reaching agreements." There is here no recognition of the disparity in bargaining power, only an uncritical, even blind, adoption of negotiation as the proper method for the realization of the principles established by the FCC.

The Transition Administrator's reference to the assistance of counsel, the cost of whose services are "reimbursable reconfiguration cost" assumes or seems to assume that:

- attorneys are willing to work on contingency or funds for counsel fees are available to licensees,

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- an automatic reimbursement process is available, and
- the presence of counsel provides complete redress to the problem of disparity in bargaining power.

These three assumptions are convenient for the Transition Administrator to make in explaining its market-based approach, but convenience is different from justifiability, and the three convenient assumptions hardly meet any serious justification test.

The combination of:

- the conflict between the self-interest of Nextel and the realization of a cost-free, trouble-free transition to comparable facilities and
- the hands-off position of the Transition Administrator in the Legal Rebanding Process, at least with respect to providing aid and comfort to 800 MHz licensees,

assured that that conflict would be ‘resolved’ by bargaining between parties of widely differing negotiating power undisciplined by any institutionalized commitment to the purpose and mandate of the FCC or to an equitable means of determining the rights and obligations of the concerned participants.

In consequence, the principles of the FCC’s mandate (and the FCC’s primary purpose in ordering the 800 MHz Rebanding) were subjected to prejudicial settlement as a part of the compromise implicit in any ‘free’ bargaining process.

Thus, for example, the ‘cost-free’ nature of the 800 MHz Rebanding has come to have a very different meaning from that which licensees could reasonably hold after a first reading of the relevant reports and orders of the FCC. The original understanding of the cost-free nature of the 800 MHz Rebanding was justifiably straightforward: **“All reasonable rebanding costs shall be borne by Nextel.”**

With the advent of bargaining as the cost-bearing determination methodology, the original understanding of the cost-free nature of the 800 MHz Rebanding had to be abandoned in favor of a more limited market-based definition: **“Where Nextel and the licensee agree on costs, all costs shall be borne by Nextel.”**

Given Nextel’s interest in minimizing its financial exposure and Nextel’s strenuous resistance to the acceptance of planning and reconfiguration costs absent satisfaction of an unrealistically rigorous standard (“absolute lowest cost”), it was inevitable and foreseeable that Nextel and licensees would not always agree on costs, and, therefore, the FCC statements concerning the cost-free nature of rebanding would really mean no more than: **“Where Nextel and the licensee do not agree on costs, there must either be a**

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compromise between the parties or a proceeding to determine the disputed cost issues.”

Implicit in any compromise is the movement of the parties from their original positions to less-demanding positions. From the standpoint of licensees that have sought reimbursement only of truly required costs, two polar alternatives (and a continuum in between) exist.

The polar positions are:

- *The incomplete payment case: compromise means either maintaining the same statement of work, but receiving less than is truly required to fund that statement of work’s being performed; or*
- *The incomplete work case: compromise means decreasing the scope of work (by the elimination of required tasks or reduction of required effort levels), but receiving payment in full.*

In the first case, the FCC’s statements concerning the cost-free nature of rebanding really mean no more than: **“All rebanding costs that a licensee can get Nextel to agree to are free, but all other required costs must be borne by the licensee”** or, more starkly, **“Nextel may not pay all the reasonable costs of rebanding”** or, still more starkly, **“The licensee may be faced with what is, in effect, an (unintentionally) unfunded federal mandate for which neither budgetary provision or actual cash may be available.”**

In the second case, the FCC’s statements concerning the cost-free nature of rebanding really mean no more than: **“All rebanding costs that a licensee can get Nextel to agree to are free, but all work which is not paid for by Nextel, even if required, shall not be performed”** or, more starkly, **“An 800 MHz licensee may not be able to perform all work reasonably required in connection with rebanding”** or, still more starkly, **“An 800 MHz public safety licensee which chooses or feels compelled to compromise may, by doing so, place the safety of the public at risk by reason of inadequate planning for the 800 MHz Rebanding or by reason of the implementation of a rebanding plan which does not assure the avoidance of more than minimal operational disruption and assure the achievement of comparable facilities.”**

Implicit in the ‘fight and do not compromise’ alternative are the facts that:

- Litigation is uncertain, and the results thereof cannot be assured; and
- The parties bear their own litigation costs under present FCC rulings for proceedings involving review of recommended decisions arising from mediations,

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and appeals from first-level FCC review, trials de novo, appeals to the FCC therefrom, and appeals to the federal court system from decisions of the FCC.

In light of those issues, the licensees' impulse to compromise is certain, and, absent compromise, the FCC's statements concerning the cost-free nature of rebanding really mean no more than:

“All rebanding costs that a licensee can get the mediator to recommend are free (assuming Nextel seeks no review), and all other required costs must be borne by the licensee”; and

“All rebanding costs that a licensee can compel Nextel to pay are free, and some of the costs of creating that compulsion must be borne by the licensee.”

This practical diminishment of the cost-free dimension of the FCC's mandate was clearly foreseeable in:

- the absence of procedural safeguards and
- the failure to redress the greater bargaining/financial power of Nextel compared to that of many licensees.

X. The Foreseeable Nature of the Structural Design Flaws: The Lost Opportunity for Providing Compensation in the Proper Administration or the Problem of a Compromised and Ineffective Transition Administrator

In certain respects, the problems of the 800 MHz Rebanding, and in particular the troubling consequences of the conflict between the self-interest of Nextel and the realization of a cost-free, trouble-free transition to comparable facilities, are the result of a lost opportunity.

If:

- *The Transition Administrator had had or soon earned a reputation for independence, leadership, competence and creativity applied to the 800 MHz Rebanding;*
- *The Transition Administrator had seen itself as the champion of the FCC's purpose in ordering the 800 MHz Rebanding and of the FCC's mandated method for achieving that purpose; and*
- *The Transition Administrator had acted vigorously and effectively in that role as champion,*

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then real mitigation of the effects of the structural flaws in the 800 MHz Rebanding could have been achieved.

Such mitigation was not forthcoming. RCC will not here speculate why the Transition Administrator failed to provide that mitigation or why the Transition Administrator so clearly exacerbated the effects of the structural flaws in the 800 MHz Rebanding by its own strengthening of the position of Nextel in the bargaining process (by means of the notorious ‘at-risk’ rule and the lack of even-handedness in relation to confidentiality, both discussed below).

XI. The Approach of Nextel to the 800 MHz Rebanding

The tactics available to Nextel in the process of bargaining with 800 MHz public safety licensees are not constrained by the structure established by the FCC for the 800 MHz Rebanding except for those aspects thereof concerned with obligations of good faith. Those obligations have not appeared to affect the tactics utilized in negotiations by Nextel, perhaps, because, so far as RCC has been able to observe, TA mediators have been unwilling to address claims of bad faith on the part of Nextel.

This lack of constraint upon Nextel may, in some material degree, follow from the fact that, although 800 MHz licensees have certain certification obligations in relation to cost estimates, there are no certification obligations imposed upon Nextel in relation to its objections to 800 MHz licensees’ cost estimates or to Nextel’s counteroffers to such licensees and no express requirements that Nextel provide rationales and supporting evidence for all objections to cost recovery and in support of counterclaims made.

These factors form the basis of the ‘free’ bargaining environment for cost recovery, but, in the circumstances, some participants are freer than others. That bargaining environment and the advantages of Nextel therein ensure that the principles of the FCC’s mandate for a trouble-free, cost-free transition to comparable facilities are subjected to the shearing forces of compromise.

The advantages of Nextel in the bargaining process are not limited to its greater freedom therein. Additional advantages arise from the following facts and circumstances:

- **Nextel appears to bring to the negotiation process an entirely different frame of mind from that of many 800 MHz public safety licensees, the frame of mind of a hard bargainer in the rough and tumble commercial world, a world in which 800 MHz public safety licensees do not dwell.**
- **Nextel has the ability to create and appears successfully to have created a corporate discipline in relation to the 800 MHz Rebanding (in terms of training, budgeting, and organizational support) that is unavailable to 800**

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MHz licensees or difficult for them to create and that such licensees are discouraged by Nextel and the Transition Administrator from creating.

- **Nextel does not appear to have any practical limitations placed upon the costs it incurs to resist the claims of 800 MHz licensees as those costs are presumably to be credited against Nextel's minimum financial obligation (assuming that obligation is not to be exceeded).**
- **Nextel's expenses of resisting the claims of 800 MHz licensees are subject to review and audit, but are not subject to negotiation as are the claims of such licensees. While those licensees' expenses require the consent of Nextel (and the Transition Administrator), Nextel's expenses do not require the consent of licensees in any manner or form, are not even disclosed to licensees, and are not negotiated with anyone, but, rather, only reviewed under some reasonableness standard without their being subjected to any actual bargaining.**

These factors add to the inequality of bargaining power between Nextel and 800 MHz licensees in relation to Nextel financial obligations in the 800 MHz Rebanding.

XII. Implementation Failures in the Administration of the 800 MHz Rebanding

Many actions could have been taken by the Transition Administrator to increase the likelihood of the realization of the FCC's mandate for a trouble-free, cost-free transition to comparable facilities, but those actions have not been taken. Instead of appreciating the effect of 'free' bargaining upon that mandate and acting to limit the degree of the compromise of the principles of that mandate, the Transition Administrator has generally failed to provide leadership to achieve the FCC's purpose and carry out the FCC's mandate.

With its hands-off 'neutral' stance as between the parties, its focus upon endless auditing and reviewing of the cost information provided by 800 MHz public safety licensees in connection with requests for planning funding, PFAs, and RFAs at a cost in fees and expenses large in relation to any possible overstated claims by those licensees, its complete de-emphasis of the declared purpose of the FCC in relation to the 800 MHz Rebanding and of the mandate of the FCC to accomplish that process, the Transition Administrator has not made the necessary positive contribution to the 800 MHz Rebanding. Indeed, a number of the contributions of the Transition Administrator have been directly adverse to the purposes of the process and have improperly strengthened the already advantageous bargaining position of Nextel or otherwise compromised the credibility of the process, contributions not truly consistent with the claimed neutrality of the Transition Administrator.

This discussion will be limited to:

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- the “at-risk” rule; and
- the matter of confidentiality.

In the *Reconfiguration Handbook (1st Release)* (April 21, 2005) and the several later versions thereof, the Transition Administrator states that costs incurred by an 800 MHz licensee in connection with the 800 MHz Rebanding before an agreement is reached with Nextel with respect to planning funding or with respect to reconfiguration itself (and approved by the Transition Administrator) are ‘at risk.’

In complete contradiction to the purpose of the FCC to improve public safety communications, the direct effect of the “at risk” rule is to limit the time and the funds 800 MHz public safety licensees have available to assure that they properly prepare for the 800 MHz Rebanding and, by so doing, avoid the disruption of the operation of public safety radio systems and assure public safety licensees of comparable facilities after the Physical Rebanding Process and to subject those licensees to the risk of not recovering the costs of their necessary and proper preparation efforts.

The “at risk” rule serves to:

- **afford protection to Nextel on the matter of its obligation to pay the costs of the 800 MHz Rebanding and to give that protection precedence over the maintenance of the availability, capacity, and functionality of public safety radio systems, which precedence is directly contrary to the public policy expressed by the FCC;**
- **impose an entirely improper chilling effect upon 800 MHz public safety licensees’ undertaking necessary preparations for the 800 MHz Rebanding; and**
- **enable the Transition Administrator and Nextel to hold the risk of not recovering costs *in terrorem* over the heads of public safety agencies and, thereby, discourage, even disable, risk-averse funds-limited agencies from taking required action necessary to protect the public interest.**

For the reasons stated:

- *the “at risk” rule does not serve, and indeed conflicts with, the primary purpose of the FCC in ordering the 800 MHz Rebanding: improving public safety communications;*
- *the “at risk” rule is not a neutral or equitable principle as its benefit is entirely one-sided serving the interest of Nextel directly at the expense of 800 MHz licensees and, in particular, 800 MHz public safety licensees and, for that reason,*

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tends to undermine the critical appearance of disinterestedness on the part of the Transition Administrator;

- *the “at risk” rule discourages action on the part of 800 MHz licensees, paralyzes the reconfiguration process pending consent by Nextel, deprives 800 MHz licensees of vitally needed time for planning and implementation, and endangers the timely completion of the required tasks; and*
- *given that the “at risk” rule disserves the central purpose of the Commission in ordering the 800 MHz Rebanding, that rule cannot be saved by seeking to justify it by any purported benefit it may have in protecting the residual financial interest of the United States Government in the funds committed by Nextel to the 800 MHz Rebanding because the Commission gave no priority at all to such protection, but rather only an assurance of equitable treatment.*

In sum, the “at-risk” rule ever so clearly exacerbates, rather than mitigates, the effect of the structural flaw in the framework of the 800 MHz Rebanding arising from the inherent conflict between the FCC’s mandate for a disruption-free, cost-free transition to comparable facilities for 800 MHz licensees and Nextel’s interest in minimizing its financial obligations in relation to the 800 MHz Rebanding.

In certain respects, the *Confidentiality Policy for the 800 MHz Transition Administrator, LLC* (version 1.0) (December 7, 2005), which was in effect until the issuance of a newer version (version 1.1) by the Transition Administrator on February 28, 2007, also served the interests of Nextel and exacerbated, rather than mitigated, the effect of the structural flaw in the framework of the 800 MHz Rebanding arising from the inherent conflict between the FCC’s mandate for a disruption-free, cost-free transition to comparable facilities for 800 MHz licensees and Nextel’s interest in minimizing its financial obligations in relation to the 800 MHz Rebanding.

That policy provided for, among other matters, the automatic confidential treatment of:

- the record in mediation proceedings (and presumably any recommended decision of the mediator); and
- all agreements between Nextel and 800 MHz licensees respecting frequency reconfiguration (and, presumably, agreements respecting planning funding).

The effect of such confidential treatment is and may be intended to be that only Nextel and no 800 MHz licensee is aware of:

- *all mediation proceedings, the positions taken therein, and the recommended disposition thereof; and*

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- *all material agreements between Nextel and 800 MHz licensees respecting the 800 MHz Rebanding and the terms and conditions thereof.*

By its confidentiality policy, the Transition Administrator assured that Nextel and only Nextel has access to all relevant precedents. The advantages for Nextel created by this result were both obvious and not obvious:

- Obviously, it was of great advantage to Nextel to know the results of and positions taken in all mediations and the terms and conditions of all material agreements because such exclusive knowledge offers one-sided insight to Nextel without the burden of consistency that shared knowledge would impose.
- Not so obviously, Nextel's knowledge of the results of and positions taken in all mediations and the terms and conditions of all material agreements was of great advantage to Nextel because it enabled Nextel to make, and it did make, assertions in the negotiation and mediation processes about standards and averages in matters concerning costs for particular activities for which reimbursement is sought by 800 MHz licensees without those licensees' having access to the information necessary to test either the reliability or relevance of those assertions of Nextel.

Like the "at risk" rule, the Transition Administrator's Confidentiality Policy is not a neutral or equitable principle as its benefit is entirely one-sided serving the interest of Nextel directly at the expense of 800 MHz licensees and for that reason tends to undermine the critical appearance of disinterestedness on the part of the Transition Administrator.

It took the Transition Administrator almost a year to recognize "the benefits of licensees having some level of basic details they can compare with each other" and that "[s]haring of information between licensees enables licensees to have a better understanding of where they are and learn from their neighbors," but claimed that Frequency Reconfiguration Agreements are between Nextel and 800 MHz licensees and not under the control of the Transition Administrator. (*Communications Daily*, August 17, 2006)

While the Transition Administrator's Confidentiality Policy was binding only upon the issuer thereof, by binding itself to confidential treatment of Frequency Reconfiguration Agreements, the Transition Administrator precluded itself from making obviously important information on precedent, all of which is held by Nextel, available on an equal basis to 800 MHz licensees. Indeed, the Confidentiality Policy stated: "The TA generally will deny any request by Stakeholders, the media, or other members of the public that seeks access to Confidential Information within the TA's possession." Such self-preclusion could only and did serve the interests of Nextel.

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Although the Transition Administrator seems clearly to have had the power to have addressed the information advantage in favor of Nextel, it was only the FCC that took definitive steps to address that issue. On January 8, 2007, the Commission adopted an order (DA 07-27) in the 800 MHz Rebanding relating to the disclosure or exchange of information between 800 MHz public Safety licensees concerning PFAs and FRAs between such licensees and Nextel (the “January 2007 Disclosure Order”).

The January 2007 Disclosure Order sought properly to address the problems created for the exchange and disclosure of information concerning PFAs and FRAs by Sprint Nextel’s generally successful efforts to include a nondisclosure provision in such agreements. (January 2007 Disclosure Order, at ¶¶ 1-3) The Commission found that the inability of such licensees to exchange or disclose such information “impedes the good faith obligations the Commission imposed upon both Sprint and incumbent licensees.” (January 2007 Disclosure Order, at ¶ 4)

The new version of the Transition Administrator’s Confidentiality policy conforms that policy to the January 2007 Disclosure order, but does not otherwise break new ground or provide any support to 800 MHz public safety licensees which still suffer from an information deficit relative to Nextel. (In this connection, see the *Submission of RCC Consultants, Inc., respecting a Fundamental and Unacknowledged Problem in the Use of the Planning Cost Statistics Compiled by the 800 MHz Transition Administrator as Guidance in Evaluating the Reasonableness, Necessity, and Propriety of Planning Costs in connection with the 800 MHz Rebanding* which seeks to identify and consider what RCC believes to be an important, but unintended, consequence of effort of the January 2007 Disclosure Order, which submission is being filed contemporaneously with this Discussion Paper.)

XIII. Available Remedies:

The remedies available to address the structural problems and the implementation and administration problems that plague the 800 MHz Rebanding are in certain respects reasonably clear and have in many respects been discussed at length elsewhere. Reference is made to the Pandora filing for the discussion of available remedial actions provided therein. That discussion will not be repeated here.

Offered below are three possible broad approaches to remediation:

- Replacement of the Transition Administrator in whole;
- Replacement of the Transition Administrator in part; and
- Leaving the Transition Administrator in place and subjecting the Transition Administrator to the control of a person or group (itself subject to active FCC-oversight) that would direct the staff of the Transition Administrator to rededicate

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its efforts to the purposes of the FCC in ordering the 800 MHz Rebanding and to the realization of the principles of the FCC's mandate for a cost-free, trouble-free transition to comparable facilities.

The replacement of the Transition Administrator in whole may or may not be justified based upon the record and depending upon one's judgment in relation thereto. Even if justified, however, the replacement of the Transition Administrator in whole seems a politically remote prospect and possibly not practical given that the 800 MHz Rebanding will soon have been ongoing for three years. Replacement in whole is simply too unlikely a prospect to make dwelling at length therein a productive undertaking.

The replacement of the Transition Administrator in part may be more plausible from a political and practical standpoint. This possibility, though hardly likely, is worth exploring because such exploration provides another window upon the activities of the Transition Administrator and the problems associated therewith.

The third broad remedial approach would involve leaving the Transition Administrator in place and subjecting the Transition Administrator to the control of a person or group (itself subject to active FCC-oversight) that would direct the staff of the Transition Administrator such as to rededicate its efforts to the purposes of the FCC in ordering the 800 MHz Rebanding and to the realization of the principles of the FCC's mandate for a cost-free, trouble-free transition to comparable facilities.

RCC favors this third approach and recommends that:

First, the Transition Administrator be subject to the control of a full-time chief executive officer with strong public safety credentials who would be able to retain such support as may be required and who would report to a committee whose members would be broadly representative of the public safety community;

Second, both the chief executive officer and the committee be subject to active FCC-oversight and have as their sole responsibility directing the staff of the Transition Administrator such as to rededicate its efforts to the purposes of the FCC in ordering the 800 MHz Rebanding and to the realization of the principles of the FCC's mandate for a cost-free, trouble-free transition to comparable facilities for 800 MHz public safety licensees;

Third, the chief executive officer be a person seconded by the FCC or drawn from the ranks of those closely associated with the interest of public safety communications;

Fourth, the proposed committee be composed of representatives of the principal organizations serving the interests of the public safety community and be constituted as an official FCC-sanctioned "Rebanding Leadership Committee" to ensure that the work of the Transition Administrator well serves the purposes, principles, and mandate of the FCC in relation to the 800 MHz Rebanding and no other purpose;

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Fifth, the expenses of the chief executive officer and the Rebanding Leadership Committee be borne by the same source of funds as that which supports the Transition Administrator;

Sixth, the chief executive officer and the Rebanding Leadership Committee would be authorized to engage such external support, technical assistance, and legal advice as a majority thereof deemed necessary or proper to achieve the critical purposes of that committee.

Seventh, the chief executive officer and the Rebanding Leadership Committee would be required to make reports and recommendations to the FCC as they deem necessary or proper, including but not limited to changes to the policies and practices of the Transition Administrator in order to assure achievement of the goal of the 800 MHz Rebanding, make the 800 MHz Rebanding more efficient and less costly by eliminating unnecessary activities by the Transition Administrator, and establish a proper balance in bargaining power between 800 MHz public safety licensees and Nextel in order to assure that the FCC's mandate for a disruption-free and cost-free transition to comparable facilities is in no manner further compromised (all with an understanding that the FCC would review and make determinations with respect to those recommendations promptly and, where necessary or appropriate, give full force and effect thereto).

RCC's position is framed with reference not to an ideal, but unavailable solution, but, rather, to the realities affecting the 800 MHz Rebanding, the need to set that process on a proper course, and the requirement for immediate action.

XIV. Conclusion

This discussion paper has shown that:

- **The implementation of the best of intentions of the FCC has produced some substantive results which the FCC cannot have wished for;**
- **Those undesired results include the actual or potential compromise of the planning for reconfiguration and of physical reconfiguration processes that could place 800 MHz public safety communications systems at risk of disruption, a result that can hardly have been intended by the FCC in any proceeding and certainly not in a proceeding with the primary purpose of improving public safety communications;**
- **Those undesired results also include the imposition of costs upon 800 MHz licensees, which imposition is inconsistent with the FCC's representations that all costs in connection with the 800 MHz Rebanding would be borne by Nextel;**

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- **The causes of those undesired results are to be found in certain structural flaws inherent in the process established by the FCC for the 800 MHz Rebanding;**
- **The implementation of the 800 MHz Rebanding by the Transition Administrator has not mitigated, but has, rather, exacerbated those structural flaws;**
- **The structural flaws and the defects in implementation of the 800 MHz Rebanding can and must be remedied directly;**
- **Those flaws and defects are not, even with time, self-healing, and, therefore, merely extending the FCC's schedule for the 800 MHz Rebanding, which is in any event almost certainly necessary, is not an effective or sufficient remediation method; and**
- **A remediation approach has been suggested that appears practical and should be effective in rededicating the 800 MHz Rebanding to its original intent.**